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93-8

Supreme Court, U.S.
FILED
JUN 29 1993
OFFICE OF THE CLERK

NO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FRANCIS E. GLEESON, JR. Petitioner

Vs.

EILEEN KAMINSKI, THE ROMAN CATHOLIC ARCHDIOCESE OF PHILADELPHIA and THE STATE OF PENNSYLVANIA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT FOR THE DISTRICT OF PHILADELPHIA

PETITION FOR WRIT OF CERTIORARI

Francis E. Gleeson, Jr.
7344 Frankford Avenue
Philadelphia, PA 19136
(215) 624-6094
Counsel Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below err in holding that Petitioner was entitled to almost no compensation as executor and/or as attorney in this estate where Petitioner performed all duties completely and without objection to the manner in which performed and he charged only the ordinary fees for such services in Pennsylvania, fees that are approved by the Pennsylvania Inheritance Tax Department, fees which were agreed to by the challenger, Eileen Kaminski, and fees that are the same as Eileen Kaminski's attorney charges when he handles estates?

2. Did the Court below err in holding that the rights of contracts guaranteed by the United States Constitution (Article 1, Section 17) and the

Pennsylvania Constitution (Article 1, Section 10, Subdivision 1) were not violated when Petitioner was awarded almost no compensation as executor and/or as attorney in this estate where Petitioner performed all duties completely and without objection to the manner in which performed and he charged only the ordinary fees for such services in Pennsylvania, fees that are approved by the Pennsylvania Inheritance Tax Department, fees which were agreed to by the challenger, Eileen Kaminski, and fees that are the same as Eileen Kaminski's attorney charges when he handles estates?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FRANCIS E. GLEESON, JR. — PETITIONER

AND

EILEEN KAMINSKI — RESPONDENTS

THE ROMAN CATHOLIC
ARCHDIOCESE OF PHILADELPHIA

THE STATE OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE
PENNSYLVANIA SUPREME COURT FOR THE
DISTRICT OF PHILADELPHIA

The petitioner Francis E. Gleeson, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court for the District of Philadelphia, entered in the above entitled proceeding on September 30, 1992.

OPINIONS BELOW

The Supreme Court of Pennsylvania denied Francis E. Gleeson, Jr.'s petition for allowance of appeal on April 6, 1993.

That denial is not reported in an official published reporter. The opinion of the Superior Court of Pennsylvania which was the subject of the petition for allowance of appeal to the Supreme Court of Pennsylvania is not reported in an official published reporter, but bears a docket number of No. 03725 (Philadelphia, 1991). The denial of the petition for allowance of appeal by the Supreme Court of Pennsylvania and the opinion of the Superior Court of Pennsylvania are reprinted in the appendix to this petition.

JURISDICTION

The denial of the Petition for Allowance of Appeal by the Supreme Court of Pennsylvania was entered on April 6, 1993. No petition for rehearing was filed. The opinion and judgment of the Superior Court of Pennsylvania was entered on September 30, 1992. The Petition for Reargument by the Superior Court of Pennsylvania was denied by Order dated December 4, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 10 (1). No State shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal: coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

CONSTITUITION OF THE COMMONWEALTH OF PENNSYLVANIA

ARTICLE I

Ex Post Facto Laws; Impairment of Contracts Section 17. No ex post facto law, nor any law impairing the obligation of contracts, or making irrecovable any grant of special privileges or immunities shall be passed.

HISTORY OF THE CASE

Edward L. Phillips signed his will in my office on June 8, 1985. About a week before that, Mr. Phillips had been in my office discussing what he wanted in his will. Mr. Phillips wanted to leave everything to his wife, Helen, if she was alive when he died, but his wife, Helen, predeceased him. The will went on to say that if his wife, Helen, was not alive at the time of his death, one-half was to go to his daughter, Eileen Kaminski, one-sixth was to go to Our Lady of Ransom Catholic Church and one-sixth each was to be held in trust for his granddaughters, Christina Daniels and Pamela Kaminski with his daughter, Eileen Kaminski, to be trustee. Mr. Phillips appointed me as executor. I had discussed with Mr.

Phillips, as I always do, that it is almost always preferable to have a family member as executor, but Mr. Phillips insisted that I be executor and so I accepted. I told Mr. Phillips that I charged 5% of the estate as attorney and 5% of the estate as executor and he agreed to it. I pointed out that I do a large number of wills and never ask to be executor and rarely get to be executor because I believe, in most cases, a family member should be executor.

Edward L. Phillips then died on February 8, 1990.

Mr. Phillips had a total gross estate of $130,622.13. Most of the value of which was in his house and real estate known as 7611 Revere Street, Philadelphia, Pennsylvania. From this gross estate of $130,622.13, the estate

had $27,716.85 in deductions leaving a net estate of $102,905.28.

Shortly after Edward L. Phillips died, his daughter, Eileen Kaminski, brought me the will, which had been in his possession, and asked me to handle her father's estate, which I agreed to and I explained that I would charge the ordinary fee, which is 5% each for attorney and executor. I also explained that we would need a real estate broker to see the decedent's property and that Eileen Kaminski could have anyone she choose and that I would cooperate with her choice. I did mention that I was a real estate broker myself and Eileen Kaminski did choose me and agreed to pay me the ordinary real estate commission which brokers charge, of 6%. We had settlement on the house and real estate

known as 7611 Revere Street, Philadelphia, Pennsylvania on April 5, 1990 and received a sale price of $99,900.00. This was an outstandingly good price for this property. I am sure anyone who knows Northeast Philadelphia real estate prices will confirm this and the sale was made very promptly. Settlement was less than two months after the deceased's death.

We filed the PA inheritance taxes on May 4, 1990 and I was prepared to make distribution to the heirs on that same date. This was less than three months following the date of death.

Around this time, after all the services to the estate had been completed, Eileen Kaminski took me to court, challenging my fees. Our relationship had been friendly prior to

this. Since this legal battle started, I have distributed most of the money to the heirs as per the will and have received no objections to the distribution.

I did not keep hourly records but I had worked an enormous amount of hours on this estate and have continued to work an enormous amount of hours on this estate. I enclose a copy of the time chart that I have reconstructed from my personal calendar, from correspondence and from my own memory. This case was argued before Judge Theodore Gutowicz who decided that I could retain my full fee as real estate broker but that I was to receive zero as attorney and zero as executor.

I have been offering to settle on the basis of what my opponent, Richard McConaghy, Esquire and/or his firm, White and Williams, charges when they handle

estates as executor and attorney. I have now improved this offer so as to settle for eighty percent (80%) of what my worthy opponents would have charged.

We attach an affidavit from one, Thomas A. Cavanaugh, who was pricing attorneys to handle his mother's estate and was informed by an employee of White and Williams that White and Williams charge at least 8% to handle an estate as attorney. Nothing was said as to an additional fee for executor. Mr. McConaghy was outraged by this affidavit, but did not deny its truth.

This case came before Philadelphia Orphans' Court Judge Theodore S. Gutowicz on October 22, 1990. Judge Gutowicz awarded me $.00 as an attorney's fee and $.00 as an executor. I appealed to the Philadelphia Orphans' Court En Banc. In

an opinion dated November 8, 1991, Judge Edmund S. Pawelec awarded me less than 1% each as attorney and executor even though Judge Pawelec said that I handled the estate "expeditiously" and further said that "The estate did not suffer any detriment or loss because of any action or inaction on his part." He also pointed out that I had done every single thing that needed to be done as far as handling the estate went. Judge Pawelec's Opinion has been affirmed by both the Pennsylvania Superior Court and the Pennsylvania Supreme Court. I attached copies of all these Opinions and Orders.

ARGUMENT

i. The Opinion of the Philadelphia Orphans' Court En Banc written by Judge

Pawelec.

On behalf of the Philadelphia Orphans' Court En Banc, Judge Pawelec wrote "The estate did not suffer any detriment or loss because of any action or inaction on his part." But, having said this stated that I was entitled to almost nothing because of my failure "to give the Court any information on which to act."

The Court did not specify the type of information that they were looking for, but they said what was not good enough.

(a) A GOOD JOB IS NOT PROOF OF A GOOD JOB.

The Court pointed out that I did everything necessary to be done and did it "expeditiously" but concluded that this perfect job I did was not proof that

I did anything. If this sounds contradictory - it is.

(b) **TIME SHEETS SHOULD BE IGNORED.**

I went to a lot of trouble to reconstruct the hours I put in on this estate, but this was ignored by the Philadelphia Orphans' Court En Banc and this in spite of the fact that we do not have a rule saying that hourly records must be kept. So hourly records also do not justify getting paid according to the Court's En Blanc.

(c) Conclusion: **THERE IS NO KNOWN WAY TO JUSTIFY AN ESTATE FEE IN PENNSYLVANIA.**

The two most obvious ways of justifying an estate fee do not work with the Philadelphia Orphans' Court En Banc. A good job does not justify a fee. Nor does the Court En Banc say what would

justify a fee.

Please, Your Honors, this situation must change. It must be that a good job done proves a good job done and consequently a fee and/or time records prove that a fee is justified. If the second alternative is chosen then the Court should make it a rule that time records be kept. Currently that is no such rule. It is a violation of Constitutional Due Process that there is no established way to justify an attorney's and/or executor's fee in Pennsylvania.

(d) ATTORNEYS AND EXECUTORS FEES FOR HANDLING ESTATES.

There is a person that I have a special relationship as far as fees go. The person is my father, Francis E. Gleeson, who as a lawyer, often handled

estates and who, many years ago, at least forty years ago, told me that an ordinary fee for an executor handling an estate was 5% and an ordinary fee for an attorney handling an estate was 5%. If you are both, you are entitled to both. Best I know and from the decisions of this Commonwealth I am entitled to believe that what Dad said is still true.

I conclude a copy of the Johnson Estate, 4 Fiduc. Rep. 2d 6, (Chest. 1983), to make this point. I also point out that the fee bill which this Court sanctioned for many years, allowed percentages above and below 5%, for attorneys and executors, averaging out to 5%. In addition, I attach a copy of what the Pennsylvania Inheritance Tax Department allows to executors and attorneys, obtained October, 1991, from

the Pennsylvania Inheritance Tax Department.

Adding both fees together, under the Pennsylvania Inheritance Tax Department schedule, I would have been permitted to deduct $13,199.78, which is slightly more than I charged, $13,062.22. I also submit that in these days of shrinking court budgets, an enormous amount of court time and money could be saved by the Supreme Court of Pennsylvania re-introducing the fee bill for executors and attorneys handling estates and I will argue this at the appropriate time.

ii. **Contract**

I had a contract with both the deceased, Edward L. Phillips, and his daughter, Eileen Kaminski, for these fees and Eileen Kaminski, in testimony, did admit that she agreed to my fees.

Therefore, by the law of contracts, I am entitled to these fees. I should point out that for both attorney and executor, you are compensated not only for your work but for your judgment. I have noticed over the years that when a testator wishes to care for a son or a daughter, but not make them executor, it is usually because the son or daughter is just not able to handle the job as executor. This may explain Edward L. Phillips' decision to insist that I be executor. I really do not know what his motives were.

iii. Saving Court Time and Money

The Supreme Court of Pennsylvania, acting through Justice Nicholas P. Papadakos, has launched a major, well deserved effort to cut court costs in the State of Pennsylvania. I suggest that

re-introducing the executors and attorneys fee schedule for handling estates would eliminate most of the fee fights in the Orphans' Court and I suggest this in a letter to Justice Papadakos, which I attach. I know that I would never be in another fee fight again if there is a fee bill. I would charge whatever the fee bill specified and that would be it. Under the present system, there is no way an attorney can avoid a fight if one of the heirs is so inclined, no matter how well intentioned the attorney is.

iv. Settlement

I would love to settle this case. To me, the fairest thing I could think of is what my opponent, Richard McConaghy and/or his firm, White and Williams, charges and I offered to settle for this

amount from the beginning. I have since offered to settle and am still willing to settle for eighty (80%) of what my opponents would charge. If I ever take an attorney to court over his fee in an estate, my morality tells me that I should be willing to discuss what I charge, myself, and how much I am charging this heir to bring the challenge.

I am suggesting, as a way to greatly reduce these fights in the future, that the attorney bringing the challenge be required to certify how much he charges when he handles estates and how much he is charging this heir to bring the challenge.

v. Richard McConaghy Filing His Brief and Motions Late

Judge Gutowicz stated that briefs

and motions be filed within 30 days of receipt of the transcript. This meant that briefs and motions were due February 8, 1991. Mr. McConaghy's briefs and motions were filed February 22, 1991. I object to the consideration of these briefs and motions for the reason that they were filed late and ask that Mr. McConaghy's Petition be dismissed for non-compliance with the Court rules.

vi. What White and Williams Charges:

The following is a list of estates handled by attorneys currently with White and Williams (my worthy opponents in this case):

	Percentage Fee
Est of	
Margaret A. Fitzpatrick	
Will No: 3022 of 1986	
Michael J. Mentzel -	

Attorney Fee $8,500.00 4%

Est of

George V. Morris

Will No: 3526 of 1986

Michael J. Mentzel -

Attorney Fee $1,200.00 16%

Est of

Eva Freedman

Admin. no: 1881 of 1987

Michael J. Mentzel -

Attorney Fee $11,553.61 9%

Elizabeth Bell & Gloria

Greenberg - Administratrix's

Fees $6,700.00 5%

Est of Elizabeth J. Boyce

Will No: 2610 of 1991

Thomas F. Cunnane -

Attorney Fee $9,825.00 4%

Est of Henry W. Scarborough, Jr.
Will No: 2924 of 1988
Provident National Bank -
Executor Fee $26,800.55 5%
White & Williams -
Attorney Fee $22,000.00 4%

All of the above fees and percentages are approximately what I am charging and I always though proper to charge and I would be happy to settle for in this case. I have been offering to settle for what White and Williams charges from the beginning and I have now lowered this offer to eighty percent (80%) of what they would have charged. So far my offer has been ignored. Hopefully, it will be accepted now.

vii.Constitutional Arguments

The chief beneficiary and chief complainer about the fee is an heir by the name of Eileen Kaminski, who had agreed to the five percent (5%) fees as attorney and as executor and was given the choice by the petitioner, of hiring any real estate broker she chose and she hired the petitioner. It can not be the law that an heir can do the executor and the attorney out of his fee by hiring him as a real estate broker. This is a violation of the rights of contracts guaranteed by the United States Constitution (Article 1, Section 17) and the Pennsylvania Constitution (Article 1, Section 10, Subdivision 1).

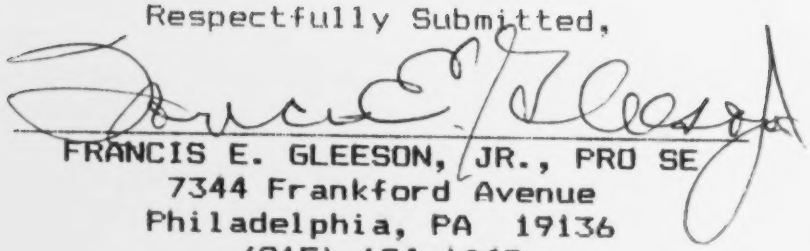
CONCLUSION

Something desperately needs to be done to set reasonable fees for attorneys

and executors handling estates in Pennsylvania. The precedent in this case cannot stand or no one will want to handle estates. Here the Court said I did a good job, ignored my time records and awarded me almost nothing. I am being challenged by a lawyer whose firm charges approximately the same for handling estates as I do.

Please, Your Honors, I am having a recession. Please award me an ordinary fee sanctioned by hundreds of years of English-American legal practice, sanctioned by the Orphans Court fee bill for many years, currently sanctioned by the Pennsylvania Inheritance Tax Department and sanctioned by my worthy opponent's law firm: White and Williams.

Respectfully Submitted,



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APPENDIX

Constitutional Provisions Involved

Johnson Estate

Affidavit from Thomas A. Cavanaugh

Reconstructed Time Chart

Pennsylvania Inheritance Tax Department Fee Schedule for Executors and Attorneys

Notes of Testimony - Trial - October 22, 1990

The Opinion and Order of Judge Theodore S. Gutowicz, dated May 2, 1991

The Opinion and Order of Judge Edmund S. Pawelec on behalf of the Philadelphia Orphans' Division En Banc Dated November 8, 1991

The Opinion and Order of Judge Patrick R. Tamilia on Behalf of the Pennsylvania Superior Court dated September 30, 1992

The Per Curiam Order of the Pennsylvania Superior Court denying reargument dated December 4, 1992

Order of the Pennsylvania Supreme Court dated April 6, 1993 denying the Petition for Allowance of Appeal

CONSTITUTIONAL PROVISIONS INVOLVED

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JOHNSON ESTATE

Compensation - Executor - Attorney

Corporate executor's commission in accord with its fee schedule as provided in testator's will, and attorney's fee $200 in excess of schedule approved by Attorney General, allowed. (Hunter 26 - Attorney 3(a); Commission 8(a).

In the Orphans' Court Division of the Court of Common Pleas of Chester County, Estate of Margaret E. Johnson, deceased. Objections to first and final account. No. 1982-166.

L. Peter Temple, for executor.

Rogers A. Bender, for accountant.

Stephen Carroll, for objectant.

ADJUDICATION BY WOOD, J.

SEPTEMBER 12, 1983:

Faith Carole Dolente, granddaughter of decedent and a beneficiary under her

will, has lodged various objections to the first and final account filed by the executor, Dowingtown National Bank. All but two have either been resolved by the parties or waived by the objectant. The two remaining objections assert that the executor's fee in the aggregate amount of $11,356.43 and a counsel fee in the total amount of $14,720.82 are excessive.

Neither party requested a hearing on these two remaining points, but instead agreed to submit the matter on briefs. In ruling on the objections, therefore, we are limited solely to consideration of those documents which have been filed of record.

With respect to the question of excessive executor's fees, item 9 of decedent's will provides:

Item 9: The above named corporate

fiduciary shall receive compensation in accordance with its standard of fees in effect from time-to-time over the period during which its services are performed.

Although not verified in any way, objectant herself attached the executor's fee schedule to her brief. Our computation of executor's fees pursuant to that schedule indicates that the executor did follow its own fee schedule as required by decedent's will.

With respect to counsel fees, it appears that the challenged fee is about $200 over the schedule of fees approved by the Attorney General, which we use for our own guidance in auditing estates. A copy is attached as "Exhibit A". Absent evidence concerning the actual worth or lack of efficacy of the attorney's services, we will approve the fee as it

appears in the account. It does not appear to be outrageously excessive on its face, and the record does reveal additional litigation not ordinarily involved in the settlement of estates.

AFFIDAVIT

I, **THOMAS A. CAVANAUGH**, 7030 Gillespie Street, Philadelphia, Pennsylvania, being duly sworn according to law, state that I contacted the law offices of White and Williams, 1234 Market Street, Philadelphia, Pennsylvania, 19107, on October 1, 1990, requesting information concerning attorney fees for handling estates. I spoke with a paralegal who stated that White and Williams' fees for handling an estate worth approximately One Hundred Thousand Dollars ($100,000.00), on a slide scale, would be about Eight Percent (8%) to Ten Percent (10%). And this figure was for the attorney fee only. The executor fee would have been in addition.

THOMAS A. CAVANAUGH

Sworn to and subscribed

before me this day

of ,1991

ESTATE OF EDWARD L. PHILLIPS, DECEASED

RECONSTRUCTED

CHART

DATE	NO. OF HOURS
February 21, 1990	2
22	2
23	1
25	3
26	2 1/2
28	1
March 2, 1990	1
3	1
5	1
8	2
9	1
10	4
12	3
13	2
15	1 1/2
18	2

	20	2
	22	1
	23	2
	25	2
	29	1
	30	1 1/2
April	1, 1990	2
	2	2
	4	4
	5	4 1/2
	7	1
	9	1
	10	2
	12	2
	13	1 1/2
	14	2
	16	2
	17	1
	19	1
	20	1

	21	3
	22	1 1/2
	23	2
	26	1
	27	2
	28	2
	30	3
May	1, 1990	2
	3	4
	4	4
	7	1/2
	10	1
	20	1
	27	2
June	6, 1990	2
	26	1/2
July	15, 1990	1
	29	2
August	7, 1990	1 1/2
	15	1

16	2
17	1
18	5
19	4
20	4
21	6
22	2
23	1
September 7, 1990	2
16	1
25	1/2
26	1/2
27	1
28	2
29	5
30	4
October 1, 1990	1
November 3, 1990	1
December 12, 1990	1
February 3, 1991	1

March	16, 1991	1
May	1, 1991	1
	2	1
	3	1
	5	3
	7	3
	9	1
September	7, 1991	2
	10	3
	15	5
	16	1
	17	2

		173

TOTAL HOURS TO SEPTEMBER 17, 1991

Attorney fee at $150.00 per hour

x 173 hours = $25,950.00

Executor fee at $80.00 per hour

x 173 hours = $13,840.00

COMMISSIONS

EXECUTOR	$0.01	TO	$100,000.00	-	5%	- $5,000.00	-	5,000.00
OR	$100,000.00	TO	$200,000.00	-	4%	- $4,000.00	-	9,000.00
ADMINISTRATOR	$200,000.01	TO	$1,000,000.00	-	3%	- $24,000.00	-	33,000.00
	$1,000,000.01	TO	$2,000,000.00	-	2%	- $20,000.00	-	53,000.00
	$2,000,000.01	TO	$3,000,000.00	-	1 1/2%	- $15,000.00	-	67,000.00
	$3,000,000.01	TO	$4,000,000.00	-	1%	- $10,000.00	-	77,000.00
Joint	$4,000,000.01	TO	$5,000,000.00	-	1/2%	- $5,000.00	-	82,000.00

ACCOUNTS - 1% P.O.D. Bonds - 1% Trust Funds.

- Real Estate Converted with aid of Broker - 5% - Non Converted - 1% -Real Estate Specific Devise

	$0.01	TO	$25,000.00	-	7%	-	$1,750.00	- 1,750.00
	$25,000.00	TO	$50,000.00	-	6%	-	$3,250.00	- 3,250.00
	$50,000.00	TO	$100,000.00	-	5%	-	$5,750.00	- 5,750.00
Attorney	$100,000.00	TO	$200,000.00	-	4%	-	$9,750.00	- 9,750.00
	$200,000.00	TO	$1,000,000.00	-	3%	-	$33,750.00	- 33,750.00
	$1,000,000.00	TO	$2,000,000.00	-	2%	-	$53,750.00	- 53,750.00
	$2,000,000.00	TO	$3,000,000.00	-	1 1/2%	-	$78,750.00	- 78,750.00
	$3,000,000.00	TO	$4,000,000.00	-	1%	-	$88,750.00	- 88,750.00
	$4,000,000.00	TO	$5,000,000.00	-	1/2%	-	$93,750.00	- 93,750.00

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Regular Commission P.O.D. Bonds and Trust Funds Joint Accounts

- Non-probate assets up to 1,000.00 Joint Accounts Fully Taxable Full Commission

After 3 1/2%	1974 June 27th, on or after Family Exemption	$2,000.00

ORPHANS' COURT DIVISION

COURT OF COMMON PLEAS OF PHILADELPHIA

IN THE ESTATE :

of : No. 2024 of 1990

EDWARD L. PHILLIPS, :
Deceased :

HEARING ON OBJECTIONS TO ACCOUNT

Monday, October 22, 1990
Room 414, City Hall
Philadelphia, Pennsylvania

BEFORE: THE
HONORABLE THEODORE S. GUTOWICZ, J.

APPEARANCES:

FRANCIS E. GLEESON, JR, ESQUIRE,
Executor,
pro se.

RICHARD W. MCCONAGHY, ESQUIRE,
For Objectant,
Eileen Kaminski, Residuary
Beneficiary.

CHARLES E. DONOHUE, ESQUIRE,
For Attorney General as
Parens Patriae for Charities.

THOMAS B. HARPER, III, ESQUIRE,
For Archdiocese of
Philadelphia and
Our Lady of Ransom.

THE COURT: Anybody want to make opening statements?

Your the attorney for the accountant; you're the accountant yourself, right?

MR. GLEESON: Yes, Your Honor. I'll submit all my papers.

Your Honor, best I know -- well, the only thing that we're fighting about here is fees, although I did see something in the -- submitted by Mr. Donohue from the Attorney General's office about how the inheritance tax would be apportioned. Aside from that -- I think I should let him argue that, because I really -- I really thought it was supposed to be apportioned the other way, but it doesn't make any difference to me. It will to the church.

THE COURT: There are objections as

to your commissions and fee.

MR. GLEESON: To my fee.

THE COURT: Both commissions and fee?

MR. GLEESON: Yes, Your Honor.

THE COURT: Therefore, the burden of proof is on you to establish that the fees and commissions you charged are fair and reasonable under the circumstances, right?

MR. GLEESON: I suppose that's right. I'll take your word for it.

THE COURT: Any other statement you want to give? This is just opening statements.

MR. GLEESON: Well, I have one. It's not only my fees, Your Honor, but I think if somebody is challenging my fee they should be in a position to say they charge less themselves -- I've made a

point of that -- and how much they're charging to challenge my fee.

THE COURT: Is there any statements to be made by counsel?

MR. DONOHUE: If I may, Your Honor, on behalf of the Attorney General.

THE COURT: You're for the Commonwealth. Identify yourself for the record.

MR. DONOHUE: Charles Donohue appearing for the Commonwealth of Pennsylvania, Office of the Attorney General as parens patriae for charities.

I would like to hand up a copy of the Objections to the First and Final Account of Francis E. Gleeson which would be handed up this morning. The first objection to counsel fee, the section concerning the apportionment of Pennsylvania inheritance tax. Since

there was no contrary intent expressed in the will, no tax clause in the will, we believe the statutory proration applies in this case as required by Title 20, Section 1744 (f), which means the one-sixth share of the residue that goes to Our Lady of Ransom Catholic Church, which is a tax-exempt institution, would not bear any portion of the inheritance taxes. There are no residuary gifts. It's simply a distribution of the residue. Accordingly, we believe this section of the Title would apply and the final distribution would not bear any portion of the inheritance taxes.

I will hand up a copy of the exception. I understand the originals are in the Court's file.

THE COURT: Yes. I just got it this morning.

MR. DONOHUE: Thank you, Your Honor. I represent Eileen Kaminski, the decedent's daughter.

I object, of course, to Mr. Gleeson's compensation which appears in three different places on that account, and executor's commission, an attorney's fee and there is a broker's commission on the sale of real estate. Those three fees taken together total $19,000, which is some 15 percent of this estate, and I think they are excessive; and I agree with you the burden is on Mr. Gleeson to establish that they are reasonable under the circumstances.

We also filed objections to some $500 of funeral expenses. Mrs. Kaminski says that she paid those, not Mr. Gleeson, and she is still waiting to be reimbursed. I believe Mr. Gleeson can

clarify for the record whether he has paid them or my client has paid them.

Mr. Gleeson.

THE COURT: We'll do that when he takes the stand.

MR. MCCONAGHY: Okay.

THE COURT: Mr. Harper.

MR. HARPER: May it please the Court, I represent Our Lady of Ransom Church. My position has been ably stated by the Attorney General. Thank you.

THE COURT: All right.

Mr. Gleeson, do you want to take the stand?

MR. GLEESON: Yes, Your Honor.

COURT OFFICER: Remain standing. State your name, spell your last name, give your business address.

THE WITNESS: Well, my name is Francis E. Gleeson, G-l-e-e-s-o-n, Jr.

My business address is 7344 Frankford Avenue, Philadelphia, Pa., 19136.

COURT OFFICER: As an officer of the court you're already under oath. Please be seated. Keep your voice up.

THE COURT: Mr. Gleeson, before we proceed, you're going to proceed without counsel to question you and to guide you in the trial of this matter?

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead. You have to ask yourself the questions and give us --

THE WITNESS: I'll have to ask myself some questions?

THE COURT: Inside your mind. This is one of the faults that attorneys make. They come up on the stand and -- go ahead.

THE WITNESS: Well, I'm going to ask myself why I charged those particular

fees, and the answer is -- it's really a very simple answer. I mean I thought that's what I'm entitled to. My father was an attorney before me. He started practicing law and charging those fees around 1930. He always said an attorney is entitled to 5 percent and the executor gets 5 percent and once in a while, if the person wants you to be executor, then you get both.

As far as the real estate commission, I know that every attorney, every broker in Philadelphia charges 6%, except for a few that charge 7 percent; and I also know that attorneys in Philadelphia that charge more than 5 percent as attorney and as executor, so I really feel I'm on the firmest ground possible.

I know that there is an ancient

tradition between the 5 percent fees for attorney and executors. I know that it goes back into Colonial times, even before Colonial times, to medieval England. I know that's how far it goes back.

I know the fee bill, which was approximately -- a lot more complicated but approximately the same thing was declared unconstitutional by the Supreme Court of Pennsylvania a few years ago, so I don't see why I should be under any obligation to follow something that's unconstitutional. So when I charged the 5 percent fees and the 6 percent, which everybody else charges or more, and I really think if an attorney is going to challenge your fee, they should explain what they charge and how much they're charging to fight your fee.

I also feel like I did a good job at every point and I did it quickly and I got a really good price for that house. We sold a house in Northeast Philadelphia, which I'm sure Your Honor is familiar with the declining real estate market, we sold the house in Northeast Philadelphia for $99,000. That's really good these days.

I just think there's no objection at all and this case shouldn't even be here, Your Honor. I was ready to distribute the money a long time ago.

As far as that money she's claiming that she paid, well, she did pay it and -- but I think it properly belongs on the accounting anyway so I put it on there and I will reimburse her when we wind this up.

THE COURT: Is that it?

THE WITNESS: I don't have anything else, Your Honor.

THE COURT: You're subject to cross-examination. Each counsel is entitled to cross-examine.

CROSS EXAMINATION

BY MR. MCCONAGHY:

Q. Mr. Gleeson, is it true about ten years ago you served as executor and trustee of the estate of Harry Watson Smullens? Do you remember that?

A. I do, and I think it's a lot more than ten years ago. I noticed that file the other day. That man died in 1977, so it would be more than ten years ago.

Q. Was there a fight in that estate about your compensation?

A. You know, I don't really remember.

Q. What did you charge, do you remember what you charged as compensation in this

estate?

A. I've always charged 5 percent.

Q. Did anyone challenge your compensation in that estate? Do you remember being in court?

A. No, I don't really remember. I don't really remember.

Q. Do you remember being in court about that estate? Was Judge Gutowicz the judge who heard that case, do you remember?

A. No, I don't remember.

Q. You don't remember. Okay.

No more questions. I'm sorry, I do have one more question.

If I understand you, Mr. Gleeson, you said in a those three miscellaneous funeral expenses that were the subject of Eileen's objections, you state for the record you have not in fact as yet paid

those out of estate funds, is that correct?

A. That's right.

MR. MCCONAGHY: Okay. Thank you. No more questions.

MR. DONOHUE: No questions of the witness, Your Honor.

MR. HARPER: No questions.

THE COURT: Is that it? Any more testimony?

THE WITNESS: Can I just consult with myself for a minute, Your Honor?

THE COURT: Sure.

THE WITNESS: There was something I meant to say, then I forgot it.

Well, yes, Your Honor, I did mean to say this. I do a lot of wills, Your Honor. I rarely get to be executor and I don't ask to be executor. When somebody suggests I'm to be executor, I try to

talk them out of it. You can bet by the time we're done, that there is -- that I don't get to be executor unless there's some good reason in the person's mind making the will that I should be executor. I don't know what the reason was in this case. Sometimes it's perfectly obvious, you know, that the beneficiaries, the family can't handle the money; but I don't think that's true here. I don't know what his reason was, but I know that I rarely get to be executor.

I do explain the fees to the person making the will. I did explain my fees to her when we were starting on this estate. She had no objection at the beginning before I did all the work. The objections only came after we were done.

I guess there was one more thing I

wanted to say. I also gave her the opportunity to select a different real estate broker. I would have went along with her choice. She chose me.

And I know that other brokers actually charge more than I do. They always have some little conveyancing fee there which is not necessarily so little or maybe they charge 7 percent.

I just know that I have the most solid tradition behind me that anybody could have; and I have nothing further to say, Your Honor.

THE COURT: You have a right to cross-examine relative to what he has just stated now.

MR. HARPER: I'll waive it.

MR. DONOHUE: No questions, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, Your Honor.

(The witness stepped down.)

THE COURT: Do you have any rebuttal testimony?

MR. MCCONAGHY: Yes. Mrs. Kaminski.

COURT OFFICER: State your name, spell your last, give your address.

THE WITNESS: Eileen Kaminski, K-a-m-i-n-s-k-i, 1751 Scattergood Street, Philadelphia, Pa.

COURT OFFICER: You do swear the testimony you're about to give before this Court will be the truth, the whole truth nothing but the truth.

THE WITNESS: I do.

COURT OFFICER: Be seated.

DIRECT EXAMINATION

BY MR. MCCONAGHY:

Q. Eileen, you're the decedent's

daughter, correct?

A. Yes, I am.

Q. What did your father leave you in his will?

A. One half of the estate.

Q. To whom did he leave the rest of his will?

A. One-third to Our Lady of Ransom Church and one-third to each of my two daughters.

Q. Okay.

The executor of the estate is who?

A. Mr. Gleeson.

Q. Okay. Did you have any meeting with Mr. Gleeson after your father's death to discuss settlement of the estate?

A. Yes.

Q. How many were they?

A. One, possibly two. I'm not positive.

Q. Where did those meetings take place?

A. In his office.

Q. Did he discuss at either of these meetings how much he was going to charge for settling the estate?

A. He explained possibly the executor's fee.

Q. To the best of your recollection what was it he told you he would charge?

A. 6 percent, I believe, for executor's commission; and I know I had the choice for the real estate broker, and he is correct when he says that I had a choice and I did pick him to sell the house, real estate.

Q. How many fees do you remember him saying he would charge? He would charge something as broker. What other fees did he tell you he would be charging?

A. The executor's commission.

Q. Any others?

A. Besides the broker?

Q. That's two, that's executive and broker. Did he tell you he wrote charge any more?

A. No.

Q. Did he at any time indicate that his fees were negotiable?

A. No.

Q. Did he say they were a flat percentage? Did he say they would depend on the work he did? How did he explain that?

A. It would not depend on the work he did, just I believe he mentioned 6 percent and I --

Q. Did he offer -- did he offer to resign as executor if you felt that the percentage he wanted to charge was excessive.

A. No, he did not. I did question Mr. Gleeson also.

THE COURT: What did you say?

THE WITNESS: I did question him on the telephone calls.

THE COURT: About what?

THE WITNESS: Regarding his fees.

BY MR. MCCONAGHY:

Q. Did he ever ask you to sign a written agreement that he could charge certain fees?

A. No.

Q. Did he ever send you a letter at the onset stating what his fees were going to be? Did he put them in writing for you?

A. No.

Q. Did you know whether or not there is a law in Pennsylvania that regulates how much executors and lawyers can receive for settling estates?

A. No, I don't know that.

Q. Did Mr. Gleeson ever tell you if there was any law in Pennsylvania that regulates how much they can charge?

A. No, he did not.

Q. Did he ever tell you that in a court case decided in Philadelphia about ten years ago the very same fees at the very same rates that he was charging your father's estate were thrown out by the Court as being excessive? Did he tell you that?

A. No.

Q. Okay. Did you have any idea that the figures he was quoting you were in any way excessive or illegal?

A. No, I had no way of knowing.

Q. Did he ever tell you that you had the right, if he thought -- if you thought he was charging too much, to come

in and ask the Court to determine what reasonable compensation was? Did he tell you you had that right?

A. No.

Q. What do you know about who selects the lawyer to handle an estate? Do you think the executor selects the lawyer? Who picks the lawyer?

A. Who picks the lawyer?

Q. Who picks the lawyer, yes. Do you know?

A. I'm not sure I understand. What person makes the will?

Q. No, I'm talking about after the person has died and the will gets filed in City Hall, the executor is appointed. At that point somebody has to engage a lawyer to handle the estate. Who does that? Is that the heir, like you, do you have a choice of the lawyer, or is that

up to Mr. Gleeson, who the lawyer is?

A. I didn't understand that you needed an attorney besides an executor to handle a will.

Q. When was it that you found out exactly what fees Mr. Gleeson was going to charge here, specific dollar amount?

A. He sent me papers in the mail and that's when I questioned him. His fee is larger than what my children are getting.

THE COURT: Just a moment.

MR. MCCONAGHY: Can I have this marked.

THE COURT: O-1, Objectant 1.

MR. MCCONAGHY: That's fine.

(A set of documents was marked Objectant's Exhibit Number O-1, for identification.)

BY MR. MCCONAGHY:

Q. Okay, Eileen, there is a letter

there from Mr. Gleeson with a couple of sheets of figures. Are those the papers that Mr. Gleeson sent you where you find out for the first time what he was charging as executor?

A. Yes, they are.

Q. Do you see on the first sheet of figures there, that's the second page, he has a line showing his executor's commission and lawyer's fees. It's highlighted in yellow. You see that there?

A. Yes.

Q. Okay. The very last sheet in the group of papers is a settlement sheet for the sale of the house, the very last, long sheet of paper. If you turn that over, on the back side up at the very top you'll see a line, Gleeson's Real Estate. You see that?

A. Uh-huh.

Q. What's the amount on there?

A. 5,994.

Q. So that's the first time that you knew that Mr. Gleeson was charging a 5 percent executor's commission, a 5 percent lawyer's fee and a 6 percent broker's commission, is that correct?

A. Yes, it is.

Q. Have you ever served as executor of an estate before?

A. No.

Q. Do you have any knowledge about what lawyers and executors charge to settle estates?

A. None.

Q. Are you employed?

A. Yes, I am.

Q. Where do you work?

A. The law firm of White and Williams.

Q. That's my law firm, isn't it?

A. Yes, it is.

Q. You work for me or some other lawyer there?

A. Another attorney.

Q. And his name is?

A. Jim Donohue.

Q. What kind of law does Mr. Donohue practice?

A. Product liability and personal injury.

Q. Does he do any estate law?

A. None.

Q. How long have you worked for Mr. Donohue?

A. Eleven years.

Q. Have you worked for any other lawyers at White and Williams?

A. No, I have not.

Q. Have you ever done any secretarial

work for an estate, every typed up any estate papers, ever typed up a bill to a client for doing estate work? Have you ever seen that?

A. I've only typed wills years ago.

Q. Did you type wills at White and Williams or some other place?

A. No, another.

Q. Where was that?

A. I worked for Joseph More.

Q. Do you remember when that was?

A. It was like 1974 or 1979.

Q. You said you typed wills. Did you do any estate settlement work for Mr. More?

A. No, I did not.

Q. Type up any bills to clients for Mr. More for estate settlement work? Do you have any idea what lawyers charge to settle estates?

A. No.

MR. MCCONAGHY: No more questions.

THE COURT: Mr. Gleeson?

MR. GLEESON: I have no questions, Your Honor.

THE COURT: You may step down.

(The witness stepped down.)

THE COURT: Does that conclude the testimony?

MR. GLEESON: I have a witness, Your Honor.

THE COURT: Where is he?

MR. GLEESON: It's Mr. McConaghy.

THE COURT: You want to call him?

MR. GLEESON: I do.

MR. MCCONAGHY: Could I have a lawyer to object to the questions he's going to ask me?

MR. DONOHUE: Ask for an offer of proof, Your Honor.

THE COURT: What is your offer of proof in calling counsel for an objection?

MR. GLEESON: To find out what he charges and ask if he handles estates.

MR. DONOHUE: Your Honor, I don't think that's relevant.

THE COURT: It may be relevant, but the question is the burden of proof is on you and you must get your expert witness in.

MR. GLEESON: He is my expert witness, Your Honor.

THE COURT: You can't -- you have to qualify a man to be an expert witness. But suppose he doesn't want to serve as your witness?

MR. GLEESON: If he handles estates and charges more, he can be my witness.

THE COURT: Are you willing to

testify?

MR. MCCONAGHY: I'm not willing to testify, but I'm not sure I have standing to object if he wants to call me, but I'm sure somebody has to object.

THE COURT: It seems to me that the burden of proof is on you to prove by your testimony or any of your witnesses that the fee you charge is fair and reasonable. He's not your witness.

MR. GLEESON: Why can't he be, Your Honor?

THE COURT: You can't subpoena -- you can't take somebody from the other side and say I want him as an expert.

He doesn't want to testify as your expert. He has a right to refuse to testify on your behalf as your expert.

MR. GLEESON: Can we at least draw the implications of his refusal to

testify?

THE COURT: No, absolutely not, unless he takes the stand and says you're absolutely wrong, it's too high of a fee. He's not going to do that.

MR. GLEESON: Can we ask him one question, whether he charges more or less?

THE COURT: That's up to him.

MR. MCCONAGHY: I'm sorry, I object to any questions.

THE COURT: He refuses to serve as your legal expert witness. He says that. He refuses to. That was your burden to prove. You're to bring somebody in who is an expert in the probate section and does estate work.

MR. GLEESON: I did, Your Honor. I brought him.

THE COURT: No, you didn't. He

refuses to testify on your behalf. You've heard him say "I object."

MR. GLEESON: All right.

I need to say one more thing, Your Honor, on a different subject. Up to today I -- submitted with my papers was a statement from the Commonwealth of Pennsylvania that they have no claim for additional inheritance tax. Up until this morning I didn't know they did have a claim.

THE COURT: First of all, let's finish one issue that's before us.

MR. GLEESON: All right.

THE COURT: Do you have any more testimony to present to this Court before we close the case as far as presentation of testimony?

MR. GLEESON: I do not, Your Honor.

THE COURT: Fine.

So, therefore, we will have these notes transcribed, give you an opportunity to file your brief based on what you have testified to and what the objectant has testified to to prove that your fees and commissions and real estate fees are fair and reasonable under the circumstances.

MR. GLEESON: Thank you, Your Honor.

THE COURT: So, therefore, transcribe the notes, charge them to the estate and when they're finished notify counsel, both sides.

And you'll both be given an opportunity to file briefs.

MR. GLEESON: Thank you, Your Honor.

MR. DONOHUE: Your Honor, if I may just clear up for Mr. Gleeson, he apparently interpreted my second objection as a request by the

Commonwealth for additional taxes. That is not the case. My objection is filed on behalf of the Attorney General as parens patriae. The question concerns the proper apportionment of taxes that have been paid.

THE COURT: You can do it by way of a brief if you want to re-emphasize it again in your brief so he understands the issue you've raised.

MR. GLEESON: That's not what I was saying.

THE COURT: Please, bring it out now in your brief. We start getting more, you'll be testifying.

MR. GLEESON: Yes, Your Honor

THE COURT: Let's have done, all right.

Thirty days from the day the court stenographer tells you the notes are

ready, then you file your briefs, have them with me and then I'll make an adjudication.

MR. GLEESON: Thank you, Your Honor.

COURT OFFICER: Court is adjourned.

INDEX
EXECUTOR'S EVIDENCE

WITNESS:	D.	C.	RD.	RC.
Francis E. Gleeson, Jr.	6	8	--	--

OBJECTANT'S EVIDENCE

WITNESS:	D.	C.	RD.	RC.
Eileen Kaminski	12	--	--	--

EXHIBITS;

NO.	Description	Ident.	In Ev.
O-1	A set of documents	16	

LOIS GANFIELD ARLENE
OFFICIAL COURT REPORTER
ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS
ROOM 404, 1321 ARCH STREET
PHILADELPHIA, PA 19107

I hereby certify that the foregoing is a true and correct copy of the notes of testimony taken by me at the hearing in the said cause.

_____

OFFICIAL STENOGRAPHER
ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS OF PHILADELPHIA
O. C. NO. 2024 OF 1990

Estate of EDWARD L. PHILLIPS, Deceased

Before: PAWELEC, ADM.J., BRUNO, BONAVITACOLA, MCKEE, JJ. AND KLEIN, Senior Judge (Specially Presiding)

DECREE

AND NOW, this day of NOVEMBER, 1991, the exceptions filed by exceptant, Francis E. Gleeson, Esquire, to the adjudication of Gutowicz, J. dated May 2, 1991 are sustained, and Francis E. Gleeson is awarded the sum of $2,122.25 as full compensation as executor and attorney.

BY THE COURT

ADMINISTRATIVE JUDGE

Francis E. Gleeson, Jr., Esquire, Exceptant

Richard W. McConaghy, Esquire

Thomas B. Harper, Esquire

Charles E. Donohue, Deputy Attorney General

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COURT OF COMMON PLEAS OF PHILADELPHIA

ORPHANS' COURT DIVISION #1 -
OCTOBER TERM, 1990
No. 2024 of 1990

Estate of EDWARD L. PHILLIPS, DECEASED
Sur account entitled
FIRST AND FINAL ACCOUNT
OF FRANCIS E. GLEESON, JR.,
EXECUTOR

This account was called for audit October 1 & October 22, 1991. Counsel appeared as follows:

FRANCIS E. GLEESON, JR., ESQUIRE
Accountant, Pro Se;

RICHARD W. MCCONAGHY, ESQUIRE
Of White & Williams,
For Eileen Kaminski,
Residuary Beneficiary;

THOMAS B. HARPER III, &
GEORGE S. FORDE, JR., ESQS.,
Of Stradley, Ronon, Stevens & Young,
For Archdiocese of Philadelphia
and Our Lady of Ransom Church; and

CHARLES E. DONOHUE,
Deputy Attorney General,
For the Commonwealth of
Pennsylvania,
as parens patriae for charities.

1ccc

This decedent died February 8, 1990, leaving a will dated June 8, 1985, which was duly probated. He was unmarried at the time of his death and was survived by his daughter, Eileen Kaminski, and her children, Christina Daniels and Pamela Kaminski.

Letters Testamentary were granted the accountant on February 23, 1990; proof of publication of the grant of same was submitted and is annexed hereto.

Payment of transfer inheritance tax, $4,888.00 on May 1, 1990, was duly vouched.

By the terms of his will, copy of which is annexed hereto, testator directed payment of his debts and funeral expenses and gave the residue of his estate to his wife, Helen R. Phillips, if she survived him, and, if his wife should

die in his lifetime, the residue is given as follows, to wit: one-half (1/2) to Eileen Kaminski, daughter of the testator, outright; one-sixth (1/6) to Our Lady of Ransom Roman Catholic Church; one-sixth (1/6) to Eileen Kaminski as trustee for her daughter, Christina Daniels, to age twenty-one; and, one-sixth (1/6) to Eileen Kaminski as trustee for her daughter, Pamela Kaminski, to age twenty-one. He appointed Francis E. Gleeson, Jr., as executor.

The family exemption was not claimed.

Helen R. Phillips, wife of the testator, died on July 3, 1988.

Testator's granddaughters, Christina Daniels and Pamela Kaminski, have not yet attained the age of twenty-one years.

The accountant is a member of the

leee

bar and a licensed real estate broker. In his account, he has taken credit for the following payments to himself, to wit: $6,531.11 for his services as executor; $6,531.11 for his services as counsel to the executor; and $5,994.00 for his services as a broker in selling the testator's residence. The executor's commission and counsel fee are each five percent of the inventoried assets, including: testator's residence, at its sales price of $99,900.00; 100 shares of Sears Roebuck stock, valued at $3,887.00; $5,489.29 on deposit in a Fidelity Bank checking account; $19,913.95 on deposit in three accounts with Third Federal Savings and Loan; $332.88 in accrued pension benefits due the testator from the City of Philadelphia; and, $1,099.01 in refunds of real estate taxes and water

and sewer charges on the sale of the testator's residence. The broker's commission is six percent of the sales price of the residence.

The attorney general, as parens patriae for charities, has appeared to object to the attorney fee of $6,531.11 as being excessive because the accountant has received the same amount as executor's commission. The attorney general also asks this Court to apportion the inheritance tax so that none of said tax is borne by the share of residue passing to the charitable beneficiary. Our Lady of Ransom Roman Catholic Church has appeared by counsel to join in the positions of the attorney general. Eileen Kaminski has appeared by counsel to object to payment of any compensation to the accountant, whatsoever, in any

capacity.

In determining the objections to commissions and fees, we adhere to the principles recited by our Administrative Judge Pawelec in **Strand Estate, 3 D. & C. 3d 457, at 459-60**, to wit:

"It is well settled that a fiduciary is entitled to 'fair and just' compensation. What is 'fair and just' compensation depends upon the extent and character of the labor and responsibilities involved: (citations omitted). Counsel fees are also compensation for services rendered. In LaRocca Estate, 431 Pa. 542, 246 A. 2d 337 (1968), the Supreme Court, in setting forth the factors to be considered in determining the compensation of the attorney for the estate, stated, at page 546:

'The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the

client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question."

This court cannot fix compensation as a percentage of the assets of an estate without some knowledge of the work actually done. The fiduciary and his attorney have the burden of proving facts which will enable the Court to make an informed judgment as to the work actually done by each and the reasonableness of the requested commissions and fees. See **Preston Estate, 385 Pa. Super. Ct. 48 (1989), Sonovick Estate, 373 Pa. Super. Ct. 396 (1988) and Reed Estate, 462 Pa. 336 (1975).** Where one person serves as both executor and counsel, he may be entitled to compensation for services rendered in each capacity which do not duplicate each other. He cannot be paid twice for the same work. The accountant

has the burden of showing what work he did in each capacity so that this Court may avoid awarding double compensation for duplicated services. See **Shillito Estate, 8 Fid. Rep. 2d 365 (O.Ct., Allegh., 1988).**

The accountant chose to represent himself before this Court. He took the stand and testified, in relevant part,

"THE WITNESS: Well, I'm going to ask myself why I charged those particular fees, and the answer is -- it's really a very simple answer. I mean I thought that's what I'm entitled to. My father was an attorney before me. He started practicing law and charging those fees around 1930. He always said an attorney is entitled to 5 percent and the executor gets 5 percent and once in awhile, if the persons wants you to be executor, you get both.

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I know the fee bill, which was approximately -- a lot more complicated but approximately the same thing was declared unconstitutional by the Supreme Court of Pennsylvania a few years ago, so I don't see why I should be under any obligation to follow something that's unconstitutional. So when I charged the 5 percent fees and the 6 percent, which everybody else charges or more, and I really think if an attorney is going to challenge your fee, they should explain what they charge and how much they're charging to fight your fee.

I also feel like I did a good job at every point and I did it quickly and I got a really good price for that house. We sold a house in Northeast Philadelphia, which I'm sure Your Honor is familiar with the declining real estate market, we sold the house in North Philadelphia for $99,000. That's really good these days.

I just think there's no objection at all and this case shouldn't even be here, Your Honor. I was ready to distribute the money a long time ago. ..." **NT 10/22/90 at 6, 7 and 8.**

On cross examination, the accountant

gave the following testimony,

"BY MR. MCCONAGHY:

Q. Mr. Gleeson, is it true about ten years ago you served as executor and trustee of the estate of Harry Watson Smullens? Do you remember that?

A. I do, and I think it's a lot more than ten years ago. I noticed that file the other day. That man died in 1977, so it would be more than ten years ago.

Q. Was there a fight in that estate about your compensation?

A. You know, I don't really remember.

Q. What did you charge, do you remember what you charged as compensation in that estate?

A. I've always charged 5 percent.

Q. Did anyone challenge your compensation in that estate? Do you remember being in court?

A. No, I don't really remember. I don't really remember.

Q. Do you remember being in court about that estate? Was Judge Gutowicz the judge who heard that case, do you remember?

A. No, I don't remember." **NT 10/22/90 at 8 and 9.**

Eileen Kaminski testified that, prior to her father's death, she had never inherited money. She had no idea of how a decedent's estate is administered. She was ignorant of the duties and compensation of an executor and his counsel. The extent of her knowledge of estates is apparent from her testimony that she, "..didn't understand that you needed an attorney besides an executor to handle a will." **NT 10/22/90 at 16.** Ms. Kaminski had one or two meetings with the accountant after the death of her father. The accountant offered to hire the broker of her choice to sell the decedent's residence. She asked him to sell the property. The accountant told her that he would charge an executor's fee of six percent. She

understood that, "It would not depend on the work he did,..." **NT 10/22/90 at 14.** He did not tell her that he would charge a fee as attorney to himself as executor. There was no written fee agreement or letter. He did not offer to negotiate the broker's and executor's commissions. He did not tell her that he had been surcharged by this Court, in the matter of **Smullen Estate, 1 Fid. Rep. 2d 80 (1980)**, where, acting as a real estate broker, executor and attorney, he sought commissions and fees identical to those he has charged on her father's residence. She did not know that he was charging commissions and fees in three distinct capacities until he sent her a letter, dated April 29, 1990, outlining virtually all items of receipt and disbursement which appear in the account.

The testimony of the accountant tells this Court nothing about the work he actually did as executor or as counsel to the executor of this estate. The testator died on February 8 and the accountant was prepared to make distribution of the remaining assets as of May 8. A review of the assets reveals no unusual problems of extraordinary services required in the administration of said assets. The residence was the most significant item and settlement was held on the sale thereof on April 5. The Sears stock was distributed to the decedent's daughter, in kind, on April 9. If this Court were permitted to fix compensation as a percentage of the assets, alone, we would be inclined to award an executor's commission of one percent and a counsel fee of three

percent of the inventoried value of all of the assets. However, the total failure of the accountant to give this Court any information upon which to make its determination, and, the total disregard of the accountant for the decision of this Court in **Smullen**, supra, leads us to deny him any compensation as executor or counsel. This Court does not believe the testimony of the accountant that he does not recall the Smullen matter. We expressly told him, in **Smullen**, supra, that it is improper for one person to charge a six percent broker's commission, a five percent executor's commission, and a five percent counsel fee on one piece of real property. And yet, he persists in his pernicious practice of charging all three commissions and fees, to the fullest,

while keeping no records of the work done in any capacity. This practice must stop. Eileen Kaminski asked the accountant to act as broker on the sale of her father's residence. Accordingly, her objection to the payment of the six percent broker's commission on said residence is denied. However, for the reasons hereinbefore stated, the objections to the executor's commission and counsel fee are sustained. The accountant will be surcharged in the full amount of said commission and fee, to wit, $13,062.22

The request of the attorney general for apportionment of the inheritance tax so that none of said tax is borne by the charitable beneficiary is well taken. The inheritance tax payment will be added back to the balances available for

distribution so that the awards may be properly made.

The account shows a balance of principal, prior to distributions and prior to payment of

inheritance tax, of	$107,050.84
and a balance of income of	1,599.00
making	$108,649.84

to which add surcharges as recited above, being

Executor's Commission	$6,531.11
Counsel Fee	6,531.11
	$13,062.22

making a total balance for distribution of $121,712.06 which, composed as set forth in the account, together with income received since the filing thereof, if any, is awarded as follows: one-half to Eileen Kaminski, individually; one-sixth to Our

Lady of Ransom Catholic Church; one-sixth to Eileen Kaminski, trustee for the benefit of Christina Daniels, for the uses and purposes set forth in the will; and, one-sixth to Eileen Kaminski, trustee for the benefit of Pamela Kaminski, for the uses and purposes set forth in the will.

The above award to Our Lady of Ransom Roman Catholic Church shall not bear any portion of the transfer inheritance tax. Each of the foregoing awards to beneficiaries other than the Church is hereby made subject to an equitable and proportionate share of such transfer inheritance tax as may be found to be due upon all assets subject to administration by the accountant.

All of the above awards are made subject to payments and transfers

heretofore properly made on account and distribution.

The accountant shall file a schedule of distribution within ninety days of absolute confirmation of this account, said schedule to contain all certifications required by Rule *72.

AND NOW, MAY _____, 1991, unless exceptions are filed to this adjudication within twenty (20) days, the account, as amended by this adjudication is confirmed absolutely.

GUTOWICZ

_____

J.

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ORPHANS' COURT DIVISION

COURT OF COMMON PLEAS OF PHILADELPHIA

O. C. NO. 2024 OF 1990

Before: PAWELEC, ADM.J., BRUNO, BONAVITACOLA, MCKEE, JJ. AND KLEIN, Senior Judge (Specially Presiding)

OPINION SUR EXCEPTIONS

PAWELEC, ADM. J.

Decedent died testate on February 8, 1990 and Letters Testamentary thereon were granted to Francis E. Gleeson, Esquire, the named executor. Decedent devised his estate one-half to his daughter, Eileen Kaminski outright, one-third to his daughter as trustee for the benefit of her two minor children and one-sixth to Our Lady of Ransom Catholic Church.

Mr. Gleeson, who is an attorney and

a licensed real estate broker, administered the estate and filed an account of his administration. In his account, he took credit for the following payments to himself: $6,531.11 for his services as executor, $6,531.11 for his services as counsel to the estate, and $5,994.00 for his services as a broker in selling decedent's residence. Objections to these credits were filed by the daughter and by the charity. After hearing, the auditing judge allowed the credit for the sale of the realty in full and disallowed the credits for counsel fees and executor's commission in their entirety. Mr. Gleeson filed exceptions to the disallowance of the two credits.

The auditing judge has correctly cited and reviewed the applicable law. It is well settled that a fiduciary is

entitled to "reasonable and just compensation" for the services he provides and the compensation should be based upon actual services rendered and not upon some arbitrary standard. Further, the determination of whether the claimed compensation is reasonable and just is left to the sound discretion of the trial court. And upon review, the decision of the trial judge as to the allowance or disallowance of fees and/or commissions will not be disturbed unless there is an abuse of discretion or palpable error. **Sonovick Estate,** 373 Pa. Super. 396, 541 A.2d 374 (1988).

In the instant case, it is undisputed that Mr. Gleeson prepared the necessary petitions to probate the will and had it probated. He advertised the grant of Letters, prepared and filed the

necessary inheritance tax returns and paid the inheritance tax in sufficient time to receive the allowed discount. He paid the creditors. He also prepared and filed an account of his administration of the estate. The estate did not suffer any detriment or loss because of any action or inaction on his part. In fact, the administration of the estate was completed expeditiously. This decedent died on February 8, 1990, and the account was filed by Mr. Gleeson on August 23, 1990. Thus, to deny Mr. Gleeson any counsel fee or commission as executor is an abuse of discretion. In fact, the auditing judge indicated on page 9 of his adjudication that he would be inclined to award an executor's commission of one (1%) percent and a counsel fee of three (3%) percent of the inventoried value of

the assets. However, he did not do so because of the total failure of Mr. Gleeson to give the Court any information on which to act. A review of the record makes this abundantly clear.

Mr. Gleeson, acting as attorney and witness, simply gave no testimony even as to the services we mentioned aforesaid that he clearly performed. He gave no explanation as to whether he did them as executor or attorney. We do note that he did request a brief delay in the trial to consult with himself. (n.t. 10/22/90 p.10). However after this consultation, he still did not give any probative testimony in regard to his services. His testimony sheds no rationale for this.

Since we have determined that to deny Mr. Gleeson all compensation for his services as executor and attorney was an

abuse of discretion, a determination must be made as to the amount thereof. It would serve no purpose to remand this for a hearing on this issue since Mr. Gleeson was given every opportunity to address the issue by the auditing judge and he failed to do so. Thus, in this most unusual case, in order to bring finality to this estate and in the interest of judicial economy, we have reviewed the record and will award compensation to Mr. Gleeson for his services as attorney and executor on a percentage basis (as permitted by 20 Pa.C.S.A. 37) on the balance of the estate excluding the realty. The account, as filed, shows a principal balance of $135,304.15. From this we shall deduct $99,900.00, the value of the real estate leaving a balance of $35,40415. We shall award Mr.

Gleeson $2,122.25 (6%) as full compensation as executor and attorney. To this extent, his exceptions are sustained.

BY THE COURT

Administrative Judge

Francis E. Gleeson, Jr., Esquire, Exceptant

Richard W. McConaghy, Esquire for Eileen Kaminski

Thomas B. Harper, Esquire

Charles E. Donohue, Deputy Attorney General

J-A33025/92

ESTATE OF EDWARD L. PHILLIPS, DECEASED	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: FRANCIS E. GLEESON, JR., ESQUIRE	)	NO. 03725 PHILADELPHIA, 1991

Appeal from the Order in the
Court of Common Pleas of
Philadelphia County,
Orphans Court Division,
No. 2024 of 1990

BEFORE: CIRILLO, TAMILIA AND POPOVICH, JJ.

OPINION BY TAMILIA, JR.:

Francis E. Gleeson appeals from the November 8, 1991 Order sustaining, in part, the exceptions he filed to the Philadelphia Orphans Court Order of May 2, 1991.

In 1985 appellant was retained by the decedent, Edward L. Phillips, to draft his last will and testament. Upon Phillips' demise on February 8, 1990, because his wife pre-deceased him, his

estate was distributed as follows: one-half to his daughter, Eileen Kaminski, one-sixth to Our Lady of Ransom Catholic Church and one-sixth to each of his granddaughters. Appellant, who is an attorney and a real estate broker, served as executor and counsel for the estate and, upon the request of Kaminski, sold the family home for $99,900. The remainder of the estate totalled $35,404.15. In his account of the administration, appellant took credit for the following payments to himself: $6,531.11 (5%) for his services as executor, $6,531.11 (5%) for his services as counsel to the estate and $5,994.00 (6%) as a brokerage fee. Objections to these credits were filed by Kaminski[1] and the church and,

[1]Our Lady of Ransom Catholic Church joins the brief filed by appellee

PUBLISHER'S NOTE

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compensation for services appellant rendered in his capacities as executor, counsel and realtor for the estate. Appellant maintains because he did a "good job" and reconstructed time sheets reflecting the hours he allegedly spent working on the estate, he was entitled to the individual compensations claimed.

In Pennsylvania, the test for determining the appropriateness of the fees charged for services rendered in the administration of an estate has always been "reasonableness." **In re Estate of Burch,** ___ Pa. Super. ___, 586 A.2d 986 (1991), Our Supreme Court has stated:

> What is a fair and reasonable fee is sometimes is delicate, and at times a difficult question. The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or

value of the property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

In re trust estate of LaRocca, 437 Pa. 542, ___, 246 A.2d 337, 339 (1968)

We do not deny the appellant did a "good job" administering the decedent's estate, but as the court reasoned when it granted, in part, Kaminski's exceptions to the payments appellant made to himself:

This Court cannot fix compensation as a percentage of the assets of an estate without some knowledge of the work actually done. The fiduciary and his attorney have the burden of proving facts which will enable the Court to make an informed judgment as to the work actually done by each and the reasonableness of the requested commissions and fees. See **Preston Estate, 385 Pa. Super. Ct. 48 [560 A.2d 160] (1989), Sonovick Estate, 373 Pa. Super. Ct. 396 [541 A.2d 374] (1988) and Reed Estate, 462 Pa. 336**

[___A.2d___] (1975). Where one person serves as both executor and counsel, he may be entitled to compensation for services rendered in each capacity which do not duplicate each other. He cannot be paid twice for the same work. The accountant has the burden of showing what work he did in each capacity so that this Court may avoid awarding double compensation for duplicated services. See **Shillito Estate, 8 Fid. Rep. 2d 365 (O.Ct., Allegh., 1988).**

(Slip Op., Gutowicz, J., 5/2/91, pp. 4-5). Appellant represented himself at the hearing and averred it was his understanding it was common practice to be paid a flat five percent commission fee if you acted in a dual capacity with regard to the administration of an estate.[2]

[2]We note with disfavor this is not the first time appellant has been before this Court arguing this exact issue. See **Smullen Estate,** 1 Fid. Rep. 2d 80 (1980), affirmed on basis of the trial court Opinion, 297 Pa. Super. 590, 441 A.2d 789 (1982). The **Smullen** Court repeated the law of Pennsylvania which

However, appellant failed to provide

this Court with the specifics of the work performed and relied, instead, on the reconstructed time sheets he assembled without benefit of time records. The appellant failed to present any specific testimony describing the services he performed nor did he differentiate between tasks performed in his capacity as executor versus his capacity as counsel for the estate. Accordingly, we find the court did not abuse its discretion by awarding appellant six percent on the estate less the value of the home and affirm the Order awarding appellant $2,122.25 (6%) as compensation for services rendered as

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states a fiduciary is entitled to "fair and just" compensation, the determination of which depends upon the extent and character of the labor and responsibilities involved.

executor and counsel for the executor.

Order affirmed.

Concurring Statement by Popovich, J.

ESTATE OF EDWARD L. PHILLIPS, DECEASED	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: FRANCIS E. GLEESON, JR. ESQUIRE	)	NO. 3725 PHILADELPHIA 1991

Appeal from the Order of the Court of Common Pleas of Philadelphia County, Orphans Division at No. 2024 of 1990.

BEFORE: CIRILLO, TAMILIA AND POPOVICH, JJ.

CONCURRING STATEMENT BY POPOVICH, J.:

The principal asset of this estate was the family home which sold for $99,000. For his services, appellant charged a total of 16% as executor, broker and counsel. This is, in my view, an outrageous abuse exceeded only appellant's daring in taking this appeal.

ESTATE OF EDWARD L. PHILLIPS, DECEASED	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: FRANCIS E. GLEESON, JR., ESQUIRE	:	No. 03725 Philadelphia 1991

ORDER

The court hereby denies the application filed October 7, 1992, requesting reargument/reconsideration of the decision dated September 30, 1992.

PER CURIAM

DATE: December 4, 1992

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: Estate of EDWARD L. PHILLIPS, Deceased	:	No. 849 Eastern District Allocatur Docket 1992
PETITION OF: FRANCIS E. GLEESON, JR.	:	Petition for Allowance of Appeal from the Supreme Court

ORDER

PER CURIAM

AND NOW, this 6th day of April, 1993, the Petition for Allowance of Appeal from the Superior Court is hereby denied.

A TRUE COPY FROM RECORD
Attest: 4/7/93

William G. Corey, Esquire
Deputy Prothonotary, Supreme Court
of Pennsylvania, Eastern District